Mortgage Foreclosure Best Practices

Senate Enrolled Act 492, codified at I.C. §32-30-10.5 *et seq*., gave defendants in residential mortgage foreclosure actions the right to request a settlement conference. Since this statute took effect on July 1, 2009, the Indiana Supreme Court, Division of State Court Administration has had opportunity to observe the functions and results of settlement conferences – both under the statute and under the Mortgage Foreclosure Trial Court Assistance Project's (MFTCAP) pilot program, administered by the Division.

While this legislation was well-intentioned, it did leave a few gaps. Working through the settlement conference process, both in MFTCAP pilot and non-pilot counties, has taught us a few things. With these in mind, here are some recommended steps and best practices in dealing with mortgage foreclosure actions. Except for where state statutes are referenced, these are only guidelines and should not be interpreted as having the force or effect of law. To produce these best practices, the Division of State Court Administration consulted with creditors' attorneys, defendants' attorneys, academics, MFTCAP facilitators, and trial judges. These practices have not been reviewed by the Indiana Supreme Court. However, they were developed in consultation with Indiana trial judges, academics, and other experts in creditor-debtor law, along with the Office of the Indiana Attorney General and the Division of State Court Administration.

These best practices have been amended effective July 1, 2011, to comport with changes in the settlement conference law under Senate Enrolled Act 582, and amended effective November 1, 2012, to incorporate changes in servicing standards under the national mortgage settlement.

These best practices are designed to be a guideline for the processing of mortgage foreclosure proceedings and are not "set in stone." Changes, innovations and suggestions are welcome and may be directed to Elizabeth Daulton at elizabeth.daulton@courts.IN.gov or (317) 234-7155.

PLEADING DISCLAIMER: The negotiable instrument "best practices" apply to pleadings only, and not to the standard of proof required by the Uniform Commercial Code (UCC). Either the Defendant or the Court may require the Plaintiff to prove (A) possession of the original promissory note, *and* (B) that Plaintiff qualifies under I.C. 26-1-3.1-301(1) or (2) or (3), and other applicable law, such as trust law.

Under I.C. 3.1-301(1), to be a "holder" (as defined in I.C. 26-1-1-201), the Plaintiff must be in possession of the original promissory note which is either endorsed in blank or is endorsed specifically to the Plaintiff. As long as signatures are valid and (if applicable) there is a clear chain of endorsements to the Plaintiff or to an endorsement in blank, there is a presumption the holder, by producing the instrument, is entitled to enforce the note, subject to valid defenses.

Under I.C. 3.1-301(2), to be a "non-holder" (as defined in I.C. 26-1-3.1-203), the Plaintiff must be in possession of the original promissory note, but unlike I.C. 301(1), the note would not be endorsed in blank or endorsed to the Plaintiff. The Plaintiff would have the burden to prove (without benefit of a presumption) a chain of title to establish the fact that it has the right to enforce the note (i.e., that Plaintiff is a "non-holder" under I.C. 3.1-203), subject to valid defenses (*see* I.C. 3.1-203 comment 2).

Under I.C. 3.1-301(3), to be entitled to enforce a lost note, the person seeking enforcement must prove the terms of the instrument and the person's right to enforce the instrument. In addition, the person required to pay the note must be adequately protected against loss that might occur by reason of a claim by another person attempting to enforce the note.

Pleading Standards of Mortgage Foreclosure Complaints

If Plaintiff seeks to enforce a negotiable instrument pursuant to I.C. §26-1-3.1-101 *et seq*., then the following "best practices" should apply with respect to the complaint:

- Plaintiff should specify the subsection of §26-1-3.1-301 on which it bases its assertion that it is a "person entitled to enforce" the instrument;

- If Plaintiff alleges that it is a "person entitled to enforce" the instrument under §26-1-3.1-301(1) or (2) because it is either the holder of the instrument (under §26-1-1-201(20)) or a transferee (under §26-1-3.1-203), then counsel should, prior to commencing the action, confirm that Plaintiff possesses the original instrument and can produce the original note in a timely manner if requested by the Court;

- If Plaintiff alleges that it is a "person entitled to enforce" the instrument under §26-1-3.1-301(1) because it is the holder of the instrument and is not the original payee, then its counsel should attach a copy of the instrument, including the endorsements showing the instrument is endorsed to bearer, in blank, or specially to Plaintiff;

- If Plaintiff alleges that it is a "person entitled to enforce" the instrument under §26-1-3.1-301(2) because it is the transferee of the instrument, then its counsel should include in the complaint an assertion that the instrument has not been endorsed to Plaintiff but has been transferred to Plaintiff for the purpose of giving Plaintiff the right to enforce the instrument.

- If Plaintiff maintains that it is a "person entitled to enforce" the instrument under §§26-1-3.1-301(3) and 26-1.3.1-309 because the original instrument has been lost, then counsel should attach as an Exhibit to the Complaint an affidavit setting forth the assertions required by §26-1-3.1-309.

At the time the Complaint is filed, Plaintiff should provide to the clerk a service list, including the name, address, and, if available, the telephone number and/or email address for each individual defendant debtor who signed the mortgage. Because many defendant debtors have been and continue to be targeted by illegal foreclosure "rescue agencies", this service list should comport with the public access exclusions of Administrative Rule 9(H)(1).

Affidavits

- In an affidavit of indebtedness filed with a motion for judgment, Plaintiff shall include the following statements, where applicable:

    - If Plaintiff is requesting to recover force-placed property insurance premiums or expenses, the Plaintiff shall affirm that (1) there was a reasonable basis to force place the insurance policy or policies; and (2) Plaintiff has complied with applicable laws concerning force-placed insurance.

    - If Plaintiff is requesting default-related fees or costs to be assessed against Defendant, Plaintiff shall set forth an itemized list of all such fees and costs. Plaintiff shall also affirm that the fees and costs requested are bona fide and reasonable and that attorney fees charged to the Defendant are only for work performed and are reasonable and customary in amount.

- If, prior to obtaining a judgment, Plaintiff discovers that an affidavit filed in the foreclosure proceeding was not in accordance with either state law or the Indiana Trial Rules, Plaintiff shall substitute such affidavit with a new affidavit and provide appropriate written notice to the Defendant or Defendant's counsel. Defendant shall not bear the cost of the correction.

Settlement Conferences:

- All courts should send a separate communication to each mortgage foreclosure defendant informing the defendant of his or her right to participate in a settlement conference. The notice sent by the lender as required by the statute does not routinely generate an appreciable response rate, whereas the single-sheet notice sent by our pilot courts has resulted in a settlement conference request rate of approximately 45 percent. The court may not delegate the duty to send the notice under I.C. 32-30-10.5-8(d) to the creditor or to any other person.

- If Plaintiff maintains that the Defendant does not qualify for a settlement conference under §§32-30-10.5-8(e)(1), loan secured by a dwelling not the debtor's primary residence, then Plaintiff's counsel should attach as an Exhibit to the Complaint any evidence in Plaintiff's possession establishing that the debtor does not personally reside at such address. If counsel cannot provide such evidence, the debtor should be sent a copy of the "Get Help – Get Hope" form prescribed by §§ 32-30-10.5-

  If Plaintiff maintains that the Defendant does not qualify for a settlement conference under §§ 32-30-10.5-8(e)(2), default of a prior foreclosure prevention agreement under this chapter, then its counsel should attach as an Exhibit to the Complaint a copy of the foreclosure prevention agreement and a record of payments substantiating default.

- If Defendant requests a settlement conference under §§32-30-10.5-9, no dispositive motions should be granted until one of the following occurs: 1) The court receives notice that the debtor and creditor have agreed to enter into a foreclosure prevention agreement; or 2) The court receives notice that the debtor and creditor are unable to agree on the terms of a foreclosure prevention agreement.

  If Defendant requests a settlement conference under §§32-30-10.5-9, the court shall treat this request as the entry of an appearance in accordance with T.R. 3.1(B).

- Upon the defendant's request, or upon information received by the court that the defendant does not have access to the internet, the facilitator or court shall send to the defendant a sample Loss Mitigation Package along with the Order for Settlement Conference. Electronic copies of these documents are available at http://www.in.gov/judiciary/selfservice/2359.htm.

- If the defendant does not provide to the Court and the plaintiff at least one (1) of the documents required as part of the loss mitigation package at least thirty (30) days prior to the settlement conference, the foreclosure may proceed, so long as the plaintiff has provided the notice required under I.C. 32-30-10.5-8(c).

- Any portion of a defendant's loss mitigation package provided to the court-appointed facilitator at least thirty (30) days prior to the scheduled settlement conference shall be considered to be "provided to the court" under I.C. 32-30-10.5-8(a)(3).

If, at the settlement conference, the parties commence discussions regarding loss mitigation alternatives and conclude that additional information or documentation should be exchanged, then cause exists pursuant to §32-30-10.5-10(b) to reconvene the settlement conference at a later date, and dispositive motions should not be granted pursuant to §32-30-10.5-8.5(b) until the settlement conference report has been submitted to the Court by the Plaintiff(s), Defendant(s), or a court-appointed facilitator. "Loss

mitigation alternatives" as referenced in this paragraph may include, but are not limited to: forbearances, repayment plans, loan modifications, short sales, and deeds in lieu of foreclosure.[1]

Foreclosure Loss Mitigation for Multistate Mortgage Settlement Participants

If Defendant's loan is serviced by Bank of America, Chase, Wells Fargo, America's Servicing Company, GMAC or CitiMortgage and the real estate secured by the loan is owner-occupied, then Plaintiff shall abide by the best practices in this section, regardless of whether the Plaintiff and loan servicer are the same entity or the loan servicer is servicing the loan on behalf of the Plaintiff:[2]

- In a pending post-judgment, pre-sale foreclosure proceeding in which an affidavit was filed which was required to be based on the affiant's review and personal knowledge of its accuracy and was not, or was not properly notarized, Plaintiff shall provide written notice of the error to Defendant or Defendant's counsel prior to proceeding with the foreclosure sale.

- If Defendant submits a complete loan modification application to modify a first lien mortgage loan to the loan servicer within 35 days of the loan being referred to foreclosure, then Plaintiff shall not move for judgment or proceed with a foreclosure sale during the modification review. If Plaintiff has already filed a motion for judgment, Plaintiff shall take reasonable steps to avoid a ruling on such a motion.

    - If Plaintiff offers Defendant a loan modification as a result of the modification review, Plaintiff must allow Defendant 14 days to accept or decline the modification offer before proceeding with the foreclosure sale.

    - If Plaintiff denies Defendant's request for a loan modification, Plaintiff must allow Defendant 30 days to appeal the denial unless the Plaintiff denied Defendant's request due to one of the following reasons: ineligible mortgage, ineligible property, offer not accepted by borrower or request withdrawn, or loan was previously modified.

- If Defendant submits a complete loan modification application to the loan servicer more than 35 days after the loan was referred to foreclosure and more than 15 days before a sheriff sale, then Plaintiff shall not proceed with the foreclosure sale during the pendency of the modification review.

    - If Plaintiff offers Defendant a loan modification as a result of the modification review, Plaintiff must allow Defendant 14 days to accept or decline the modification offer before proceeding with the foreclosure sale.

- Plaintiff shall not move for judgment or proceed with a foreclosure sale under any of the following circumstances: Defendant is in compliance with a trial loan modification, forbearance or repayment plan; or a short sale or deed-in-lieu of foreclosure has been approved by all parties (including, for example, first lien investor, junior lien holder and mortgage insurer, as applicable), and proof of funds or financing has been provided to the loan servicer.

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[1] The Making Home Affordable Program (MHA) is a federal loss mitigation program available to some borrowers. MHA includes loan modifications through the Home Affordable Modification Program (HAMP) and short sales and deeds in lieu of foreclosure through the Home Affordable Foreclosure Alternative (HAFA) program. Many loan servicers participate in MHA. Guidelines for loss mitigation alternatives available through MHA are available at: https://www.hmpadmin.com.

[2] The multistate mortgage settlement required participating servicers to implement the practices referenced in this section on or before October 2, 2012. Detailed information regarding the multistate mortgage settlement is available at: http://www.nationalmortgagesettlement.com/.

- Plaintiff's good-faith loss mitigation activity, such as a loan modification review, shall be a basis for vacating a hearing under T.R. 41(E).

Sanctions

- If either party fails to attend the settlement conference or fails to abide by other court directives, appropriate sanctions may be considered. Judges in St. Joseph and Allen counties have levied sanctions ranging from $150 to $2,500 on plaintiffs who repeatedly failed to attend a settlement conference or who refused to provide documents as requested by the court-appointed facilitator. A homeowner defendant who fails to attend the settlement conference may be perceived as waiving his or her right to a settlement conference, and the foreclosure should proceed as otherwise allowed by law.

- Defendant should not be asked by Plaintiff to waive his or her right to a settlement conference. Such action on the Plaintiff's behalf may be considered a sanctionable offense.

- Monetary sanctions collected by the court under this statute may be made payable by the circuit court clerk on a semiannual basis to the Auditor of State, to be deposited into the Mortgage Foreclosure Fund.

Post-Judgment

- Any motion to set aside a mortgage foreclosure judgment should state the reason for the request. The borrowers/homeowner should be sent notice of the request. A petition to set aside a judgment that attempts to reinstate the loan should be allowed because of reinstatement or modification of the loan or other foreclosure prevention or loss mitigation agreement.

- A party seeking to file a supplemental affidavit or substitute a previously filed affidavit must file a motion stating the grounds for the substitution. The motion should be noticed to all parties, including previously defaulted parties, and set for hearing.

Other Issues:

- I.C. 32-30-10.5-8(d)(2) requires the plaintiff in a mortgage foreclosure action to send to the defendant's insurance company, by certified mail, return receipt requested, a copy of the foreclosure complaint. It is not clear whether these mailing costs are deemed to be collectible from the defendant, whether the complaint should be filemarked, or whether the complaint should be sent by the plaintiff or plaintiff's counsel. There is no enumerated penalty for failure to comply with this notice provision.

Current as of November 2012.